

Discipline, Interpretation, and Enforcement (DIE) Board

Ruling of the Board

HEARING DETAILS

Style of Cause: Ferguson v C.R.O.

Hearing Number: 2011-07

Hearing Date: March 8, 2012

DIE Board Panel Members: Megan Mickalyk, Chief Tribune (Chair)
Joanna Waldie, Associate Chief Tribune
Mary McPhail, Tribune

Appearing for the Applicant: Kim Ferguson

Appearing for the Respondent: Zach Fentiman, Chief Returning Officer
Petros Kusmu, Candidate
Scott Nicol, agent for Mr. Kusmu

Intervener(s): Dorothy Roberts, Navneet Khinda, Ngina Wa Kaai

BACKGROUND

The following is a brief summary of the facts as provided in the CRO's ruling on this matter.

On March 6, 2012, candidate Dorothy Roberts spoke to several classes. She received permission to speak to Professor De la Hoz Siegler's 9:30 am class, where the total enrollment was 71 students. One of these students was Arnold Yu, a volunteer for the Petros Kusmu campaign. After her speech, Mr. Yu spoke to the class. Mr. Yu acknowledged in a signed declaration that he stood up and said, "Don't vote for her, vote for Petros Kusmu! I am one of your classmates where as she is nobody to you, trust me and vote for Petros Kusmu!" (Excerpted from CRO Ruling 19). Mr. Yu also acknowledged that after he sat down someone said something to him, but he did not recall the conversation. He also stated that this occurred roughly around 9:25 am, that people were still walking in to class, and that he stood up exactly when Ms. Roberts left.

After learning of this incident, Ms. Ferguson, volunteer for Dorothy Roberts, collected statements from Professor De la Hoz Siegler, and Marwyn Vernon, a student present in the class:

Excerpted statement from Professor De la Hoz Siegler from an email transcript between Kimberley Ferguson and Professor De la Hoz Siegler, dated March 7, 2012:

On March 6, 2012, at about 9:30 am, a candidate for the SU Executive Committee gave a short speech in my class. After the candidate left the classroom, one student in the class stated that the candidate (the one that had just spoken to the class) doesn't know anything and that people should vote instead for another candidate. I don't remember the exact words used by the student, or the name of the other candidate he mentioned people should vote for, though the student indeed said the name of another candidate. After that incident, most students ignored the comments, while others found amusement on them. I decided to keep the class going on, and the matter was essentially ignored.

Excerpted statement from Marwyn Vernon (student in CH E 446), from an email transcript between Kimberley Ferguson and Marwyn Vernon, dated March 7, 2012:

I am just writing you a formal report about the incident in the 446 class on Tuesday, March 6th. After Dorothy gave her speech to the class, another student stood up and said that you shouldn't vote for her, but rather to vote for this other candidate Petros (sp?) instead. He continued to explain that this other candidate was better (do a better job I assume) and has more experience. He said that the candidate did much better at the debate - signalling he had better leadership skills. He said a little bit about how this seemed to irritate her at the debate.

In response to these allegations, Chief Returning Officer Zach Fentiman made the following findings relevant to this appeal: 1) Arnold Yu was a volunteer, and not a third party, 2) the statements made by Mr. Yu were malicious, as per the definition found in Black's Law Dictionary Ninth Edition, and 3) no penalty will be imposed, as it is unclear whether these statements took place during class time, and therefore did not result in a contravention of bylaw.

ISSUES

Is Mr. Yu a volunteer on the Kusmu campaign? Did Mr. Yu make comments during class time, in contravention of Bylaw 2200? Were such comments malicious or substantially prejudicial to Ms. Roberts? Is a volunteer bound by Bylaw 2200, as the candidate he or she represents would be?

RELEVANT LEGISLATIVE PROVISIONS

Bylaw 2200

31. Restrictions on Campaign Activities

(1) No candidate or side shall, without the permission of the C.R.O. engage in any campaign activity...

c.in a classroom during a class unless he/she first obtains the permission of the professor responsible for that class

48. Penalties Available

(1) Where a candidate, side manager or volunteer has contravened a bylaw, rule, or regulation, regardless of the cause or the intent of the parties involved, and that contravention has provided an unfair advantage to a candidate, the C.R.O. shall assign a penalty that fully counter-balances any advantage gained; and where the contravention was intentional, penalizes the candidate or campaign manger who was or whose volunteer was guilty of the contravention.

49. Disqualification

(1) A candidate shall be disqualified where he/she/it is guilty of a contravention that...

b. is malicious or substantially prejudicial to another candidate or slate

50. D.I.E. Board

(3) All appeals of the C.R.O.'s rulings, with the exception of those arising out of voting and Election results, shall be heard and ruled upon by the D.I.E. Board prior to the commencement of voting.

Section F: By-election Regulations and Guidelines

2.2 Volunteers

Volunteers (anyone who assists in any campaign activity) are bound by the same rules as candidates. It is the candidate's responsibility to inform his or her volunteers of election rules.

DECISION

DIE Board finds that Mr. Yu was a volunteer for Kusmu. As a volunteer, he is, as per s. 2.2 of the Rules and Regulations, subject to the same rules as the candidate. Rules and Regulations supplement the bylaw and if the Rules and Regulations contradict the Bylaw, the Bylaw takes precedence. However, we do not find that s. 2.2 contradicts the sections of Bylaw relevant to this hearing. As such, we find that volunteers are bound by the same rules as candidates. On a balance of probabilities, we find that Yu did make an announcement during class time, contrary to s. 31(1)(c) of Bylaw 2200. We find that although the comments made were not appropriate, or within the spirit of "clean

campaigning”, they were not sufficiently egregious to be deemed malicious or substantially prejudicial as per s. 49(1)(b), and thus cannot result in disqualification of the candidate. We do, however, find that the actions warrant punishment as per s. 48, and would impose a fine of \$47.10.

THE FOLLOWING ARE THE REASONS OF MICKALYK, CHIEF TRIBUNE

In reaching our discussion, DIE Board was presented with several additional issues that I will briefly address. Mr. Nicol, acting as a representative for Mr. Kusmu contended that there were concerns regarding the admission of new evidence, and with the manner in which evidence was obtained (i.e. that it was obtained in a biased manner). DIE Board finds that there were no issues with regard to how evidence was collected. We are cognizant of the training of the students who bring matters to the board, and that many of these students do not have legal training. The Board holds that it is more important that we have all relevant information than to abide by strict legal evidentiary burdens which are not consistent or required by D.I.E. Board policy and practice. There is also nothing to preclude the admission of new evidence to a D.I.E. Board hearing.

Mr. Nicol also raised the concern that the tight timeline from when he and Mr. Kusmu became aware of this appeal to when the panel was convened was insufficient, and resulted in concerns regarding natural justice for Mr. Kusmu. We find that there was no unfairness toward Mr. Kusmu as a result of the condensed timeline. D.I.E. Board is required to convene a panel within 12 working hours of an application being brought during election season, and it is consistent with D.I.E. Board practice to arrange a hearing as promptly as possible due to the importance of the matters brought to the Board during an election season, and the immediacy with which they must be dealt. Although we agreed to a request from Mr. Kusmu that we adjourn the meeting until 5:30 PM, it is necessary to clarify that this was done to ensure he could have his agent, Mr. Nicol, present, and because we saw no considerable inconvenience or prejudice to either party in doing so. It was not because we believed Mr. Kusmu to be prejudiced by the tight timeline.

In his submissions, Mr. Nicol also made several references to previous D.I.E. Board decisions, and as such it is necessary to note that while such hearings may be of persuasive value, they are not binding on D.I.E. Board.

A final preliminary matter was whether D.I.E. Board has the authority to hold a hearing while voting is happening. It was noted by the Chief Returning Officer Mr. Fentiman that s. 50(3) of Bylaw 2200 appears to preclude D.I.E. Board from hearing this matter. However, Mr. Fentiman contended and I agree that this cannot have been the intention, and would in fact be inconsistent with other sections of the Bylaw. Specifically, s. 50(2) gives any member a right to an appeal, which cannot be exercised unless s. 50(3) recognizes that campaigning is allowed during the voting period. Currently, the section does not allow D.I.E. Board to hear any issues beyond those of voting or elections result that arise during the voting period, which is inconsistent with

the intent of the rest of the Bylaw. Consequently, these are mutually exclusive clauses, and we must look to the overall intent of the Bylaw, which is that candidates remain accountable during all points of campaigning. This requires that D.I.E. Board retain the ability to hear appeals. We infer that the intention of s. 50(3) is to prevent D.I.E. Board from stalling and failing to hear an appeal brought before voting commences when the appeal has been made beforehand. However, if this is not the intention of council, D.I.E. Board recommends that this section be revised and clarified

According to D.I.E. Board protocol, evidence is to be determined on a balance of probabilities. Mr. Yu was clearly listed as one of Mr. Kusmu's volunteers on a list provided to the C.R.O. Therefore, we find that he was a volunteer for the Kusmu campaign. With respect to whether or not his announcement was made during class time and therefore contrary to Bylaw 2200 s. 31(1)(c), we find that it was. Weighing evidence on a balance of probabilities is a lesser standard than beyond a reasonable doubt. Although D.I.E. Board cannot say beyond a reasonable doubt that Mr. Yu made these statements during class time, on a balance of probabilities we find this to be more probable than not. The Board finds that a class starts at the time it is scheduled to start, in this case, 9:30AM. We prefer the statements provided by Ms. Roberts regarding the timeline of the events, as she explicitly stated she had checked her watch and would have had more reason to be cognizant of the time. Ms. Roberts' assertions were supported by Professor De la Hoz Siegler's statement. Mr. Yu's statement gave an approximation of the time being "about 9:25" and was not consistent with Professor De La Hoz Siegler's assertion that he "...decided to keep the class going..." after the statement was made, as this would have been substantially before class started.

The next issue is whether or not Mr. Yu, as a volunteer, is held to the same rules and obligations as the candidate he is campaigning for. The Rules and Regulations provided in the Nomination Package specify in s. 2.2 that volunteers are bound by the same rules as a candidate. The Rules and Regulations are intended to supplement Bylaw. If there are any inconsistencies, Bylaw takes precedence. However there are no inconsistencies with respect to the provisions relevant to this matter. As such, Mr. Yu as a volunteer must abide by the same rules as Mr. Kusmu. As his announcement was made during class time, he is in violation of s. 31(1)(c) of Bylaw 2200.

The next issue is whether the statements made could be deemed malicious or substantially prejudicial, as per s. 49(1)(b) of Bylaw 2200. Although the comments cannot be considered appropriate or within the spirit of "clean campaigning", the comments were not sufficiently egregious to be construed as malicious or substantially prejudicial. Accordingly, it would be disproportionate for D.I.E. Board to disqualify Mr. Kusmu for Mr. Yu's actions.

As Mr. Yu's comments were made during class time, in contravention of Bylaw 2200, s. 48 prescribes that Mr. Kusmu's campaign must be fined accordingly. With reference to the fines prescribed by the Rules and Regulations, we would impose a

penalty of \$47.10. We find that Mr. Yu's actions can be deemed unsolicited campaigning, resulting in a fine of \$10.00, and an additional \$0.10 for every person reached. As classroom enrollment was 71 for the affected class, we believe Mr. Yu reached 71 people, resulting in a fine of \$7.10. An additional punitive fine of \$30.00 will be levied due to the inappropriateness of the comments made.

THE FOLLOWING ARE THE REASONS OF WALDIE, ASSOCIATE CHIEF TRIBUNE

I concur with the decision and reasons of Mickalyk, but wish to address the role of a volunteer involved in a candidate's campaign. Mr. Nicol asserted that it was not the intention of Students' Union Council for candidates to be disqualified for the actions of their volunteers. I respectfully disagree.

Volunteers are critical to a Students' Union Election campaign. A campaign requires an extensive amount of work, and volunteers are imperative to the success of such a campaign. Volunteers often act as representatives of the candidate, and their actions are a reflection on the candidate and the campaign as a whole. If a volunteer acts in a manner that is malicious, or contrary to the "spirit of clean campaigning", this reflects back on the candidate. The actions of a volunteer are therefore the actions of a candidate.

It is therefore important that a volunteer be bound by the same rules as a candidate, and that a candidate be held accountable for the actions of their volunteers. I believe it is clear why s. 48 of Bylaw 2200 speaks to a contravention of a volunteer, and the potential penalties that can be imposed on a candidate for such contraventions, including disqualification.

Mr. Nicol asserted that inappropriate actions of a volunteer will reflect poorly on the candidate, and the candidate will be held accountable by the student body through elections results. He asserted that it was therefore unnecessary to impose a penalty against a candidate in these situations. In my opinion, this is insufficient. A candidate must be aware that the actions of a volunteer could result in a penalty in order to ensure they keep a close eye on their volunteers, and to ensure they do not use volunteers to commit contraventions of bylaw. If a volunteer acts in a manner that is sufficiently egregious to result in substantial prejudice, or to be considered malicious, it is important that a candidate be held responsible for those actions, even if it results in a serious penalty such as disqualification.

THE FOLLOWING ARE THE REASONS OF MCPHAIL, TRIBUNE

I concur with the decision and reasons of Mickalyk, but wish to comment further on the determination of whether or not the statements made by Mr. Yu were malicious. I accept Ms. Ferguson's argument that malice either exists or it does not when applying 49 (1)(b). A balance must still be struck when taking statements into consideration, particularly those that, while unfortunate, can be seen to suffer from poor phrasing

more than ill will. The comments were inappropriate, but whether they were so reprehensible as to warrant additional censure is less clear. In applying a reasonable person test to whether the comments would be deplored as malicious in nature, I find they are not. It is important not to conflate not being in the spirit of “clean campaigning” with maliciousness.